PUBLIC PROSECUTOR

v.

RAYMOND CHIA KIM CHWEE & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. AZMI J
[CRIMINAL APPEAL NOS. 87 & 88 OF 1982]
15 SEPTEMBER 1982

CRIMINAL LAW AND PROCEDURE: *Charge of forgery - Documents in possession of prosecution - Application for production of - Whether provision of the law to be indicated - Whether defence entitled to copies thereof.*

CRIMINAL LAW AND PROCEDURE: *Trial - Order by Subordinate Court - Whether procedural or final and whether appealable - Court's power of revision - Exercise of - Sections 51, (1), 152, 153, 154, 173(a) Criminal Procedure Code.*

The respondents were jointly charged in the Sessions Court for the offence of forgery, using dishonestly a letter of credit for the amount of RM2.4 million with the following forged documents:

(a) Bill of Lading

(b) Certificate of Origin

(c) Certificate of Inspection

(d) Certificate of Weight

(e) Certificate as to the exclusive usage of a motor tanker.

They both applied to the President by Miscellaneous Criminal Applications for various documents in the possession of the prosecution including the five documents stated in the charge, for their inspection in order to prepare their defence. In the case of Raymond Chia, his application was in general term. Zainal applied for copies of all specified and unspecified documents including cautioned statement and first information report. They did not indicate under what provisions of the law the order could be made.

The prosecution objected on the ground that the respondents did not indicate under what provisions of the law their applications were made and if the applications were under s. 51 of the Criminal Procedure Code, they were not made in compliance with the provision of that section due to *inter alia*, lack of particularisation.

The learned President did not allow the applications *in toto* but his order was confined only to the inspection of (1) documents specifically referred to in the charge and (2) documents removed by the prosecution from the possession of the respondents.

In the appeal the respondents raised a preliminary objection that the appeal was not properly brought before the Court on the ground that the order was procedural and even if it was not a procedural order or ruling, since the learned President had made an interlocutory order and therefore not appealable.

Held:

[1] The order made by the learned President was not a procedural ruling and that it was a final order. Therefore it was appealable.

[2] The Court exercised its power of revision and allowed the first part of the order to remain on the ground that the respondents were entitled to further and better particulars of the charge.

[3] Although the respondents' applications were not properly made, the Court ordered that photostat copies of the documents specifically referred to in the charge be supplied by the Public Prosecutor to the respondents.

[Appeal allowed.]

Cases referred to:
Anthony Gomez v. Ketua Polis Daerah, Kuantan [1977] 2 MLJ 24
Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur [1979] 2 MLJ 49
Public Prosecutor v. Teoh Choon Teck [1963] 29 MLJ 34
Public Prosecutor v. Hoo Chang Chwen [1962] 28 MLJ 284
Public Prosecutor v. R.K. Menon & Anor. [1978] 2 MLJ 152
Kashi Ram Khosla & Ors. v. Dikshit [1926] AIR Oudh 280
Selangor United Rubber Estates Ltd. v. Craddock & Ors. (No. 2) [1968] 1 All ER 567
Syed Abu Bakar bin Ahmad v. PP [1982] 2 MLJ 186

Legislation referred to:
Criminal Procedure Code, ss. 51, (i), (ii), 152, 153, (i), 154, 173(a), 307(i)
Penal Code, ss. 34, 467, 471

For the appellant - Sheikh Daud, DPP
For the respondent Raymond Chia Kim Chwee - V. Balasingam; M/s. Joseph & Son
For the respondent Zainal bin Haji Ali - K.B. Thuraisingham; M/s. Morris Edgar & Clough Thuraisingham

JUDGMENT

Mohd. Azmi J:

The two respondents were charged with three others for the offence of forgery under ss. 467 and 471 of the Penal Code read with s. 34 of the said Code. In the charge preferred against them, they were alleged to have used dishonestly a letter of credit for the amount of RM2.4 million with the following forged documents:

(i) Bill of Lading;

(ii) Certificate of Origin;

(iii) Certificate to the effect that the motor tanker "GRACITA" on which the shipment of 2000 metric tones of palm olein is shipped, is used exclusively for palm oil conveyance;

(iv) Certificate of Inspection;

(v) Certificate of Weight.

After they were jointly charged in the Sessions Court, the two respondents Raymond Chia (3rd accused) and Zainal (2nd accused) applied to the President by Miscellaneous Criminal Applications for various documents in the possession of the Prosecution including the five documents stated in the charge for their inspection. In the case of Raymond Chia, his application was in general term. He applied for an order

> that the Public Prosecutor do allow the defence an opportunity to inspect and make photostat copies of all documents seized by the Jabatan Peguam Negara and/or which are in their possession and/or control in connection with the above criminal case.

His ground for making the application was that without a reasonable opportunity of studying the documents, he would not be able to prepare his defence adequately or give proper instructions to his Counsel in the conduct of the criminal case. In the case of Zainal, his application was for an order that the Public Prosecutor to deliver to him copies of a long list of specified and unspecified documents comprising of 29 categories in all, including cautioned statement and first information report. The reason for the application as contained in para. 10 of his affidavit was that he wanted some of the documents in advance to prepare adequately his defence to the charge and in the event that copies were not supplied to him sufficiently in advance, he would be compelled to seek adjournment to study the documents as and when they were introduced in evidence which would result in a delay of the trial. Both applications did not indicate under what provisions of the law the order to inspect and obtain copies of such documents could be made.

When the two applications came up for hearing before the learned President on 8 June 1982, the prosecution objected to both applications although they rightly did not object to the inspection and supply of the first information report and cautioned statement having regard, no doubt, to the decisions made in *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 MLJ 24 and *Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49. The prosecution objection was two-fold. Firstly, they argued the respondents did not indicate under what provisions of the law their applications were made. Secondly, if their applications were made under s. 51 of the Criminal Procedure Code, they were not made in compliance with the provision of that Section due, *inter alia*, to lack of particularisation. The application of Raymond Chia was made in general term and did not particularise the documents required, and as for Zainal's application, the documents sought were all-embracing and even included documents not seized from him. At the conclusion of the hearing, the learned President did not allow the applications *in toto* but his order in favour of the two respondents were confined to the inspection of (1) documents specifically referred to in the charge, and (2) documents removed by the prosecution from the possession of the respondents. In exercising his discretion the learned President relied heavily on the judgment of Hepworth J in *Public Prosecutor v. Teoh Choon Teck* [1963] 29 MLJ 34. In that case the accused was charged for forgery on two counts. He was alleged to have forged a letter and a cheque. Prior to the accused being charged, the Police had searched his house and taken away a number of documents among which was the letter referred to in the first charge. The accused's problem was that in order to be in a position to put forward the defence that the signatures of the two documents were in fact those of the complainant, it was essential for him to have before the trial either the original cheque and letter or photostat copies of them to obtain the advice of his handwriting expert. It was on these facts that the learned Judge had this to say at p. 36:

> As these documents were specifically referred to in the charges and as it was essential for the accused to have the originals or photostat copies in order for him properly to prepare his defence, which could not otherwise be prepared, it seems to me that the Public Prosecutor in order to ensure that justice was not only done but seen to be done should not have raised objections, on the particular facts of this case, to the defence being supplied with photostat copies of the letter and the cheque and also any other documents removed from his possession which he required for the furtherance of this defence, for example a letter or letters in the handwriting of the complainant.

Before me, both Counsel for the respondents raised a preliminary objection that the appeal was not properly brought before the Court on the ground that the order made by the learned President under s. 51 of the Criminal Procedure Code was a procedural one and as such not appealable. By way of analogy they cited *Public Prosecutor v. Hoo Chang Chwen* [1962] 28

MLJ 284 and *Public Prosecutor v. R.K. Menon & Anor.* [1978] 2 MLJ 152. They also argued that even if it was not a procedural order or ruling, the learned President had made an interlocutory order and again was not appealable. For this they cited *Kashi Ram Khosla and Ors. v. Dikshit* [1926] AIR Oudh 280 and *Selangor United Rubber Estates Ltd. v. Craddock & Ors.* (No. 2) [1968] 1 All ER 567. After hearing arguments, I over-ruled the objection and held that the order made by the learned President was not a procedural ruling and that it was a final order. There were two Miscellaneous Criminal Applications supported by affidavits before the learned President, not on admissibility of evidence or any procedural matter but for an order to inspect and be furnished with certain documents in the possession of the prosecution before trial. In my view the order made by the learned President was a final order purportedly made under s. 51, and therefore appealable under s. 307(i) of the Criminal Procedure Code.

On the substantive issue in this appeal as to whether the learned President was correct in the exercise of his discretion in granting the order under s. 51 of the Criminal Procedure Code, I hold the view that in this particular case, the order could not have been made under that Section. In so far as the power of the Court is concerned, s. 51(i) CPC provides:

> Whenever any Court ... considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court ... such Court may issue a summons ... to the person in whose possession or power such property or document is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons ...

The word "person" is defined under the Interpretation Act 1967 to include a body of persons, corporate or unincorporate. Thus, s. 51(i) envisages a summons to be issued by the Court against any person (including the Public Prosecutor) to produce specified documents when it considers that the production of such documents is necessary or desirable for any of the purposes stated in that Section. I agree with Seah J in *Syed Abu Baker bin Ahmad v. PP* [1982] 2 MLJ 186 at 187 that s. 51 should be construed strictly. Although it appears to be so, that Section is not intended to enable the defence in a criminal proceeding to ask for discovery of documents or inspection of documents from the prosecution before trial. As was said by Hepworth J in *Public Prosecutor v. Teoh Choon Teck* (*ante*) at p. 36:

> The need for this section would appear to be that in criminal cases neither party can obtain evidence from the opposite side by means of interlocutories or discovery of documents. The language of this section is very wide but before issuing a summons under it the Court is bound to consider judicially whether the production of the documents is necessary or relevant for the purpose of the inquiry, trial or other proceeding.

He went on to say at the same page:

> The document or thing must be clearly specified, that is, it must indicate the document to be produced and should be given at such time as to afford the party a reasonable opportunity for producing the document at the trial. A general direction to produce all papers relating to the subject in dispute will not be enforced. It must be directed at a specific document.

The person served with the summons under s. 51(i) can comply with its direction as provided in sub-section (ii) or he can appear in Court and explain why he cannot or need not produce the documents. Only then the Court can make an order whether to allow or dismiss the application under that Section. In my view, the Court has no power to order production of documents without first issuing a summons. The proper procedure would be for the requesting party to make an application for summons to be issued by the Court against a particular person and to specify the documents or property required to be produced by such person. In the instant case, no summons had been issued, and on the facts no summons

could have been issued, as the application was in too general a form in the case of Raymond Chia, and too all-embracing in the case of Zainal. So much so that they were in the nature of interlocutories or discovery of documents for which s. 51 is never intended. In the circumstances, the learned President cannot be said to have exercised his discretion judicially in granting the order even if summons had been served on the Public Prosecutor, in the first instance.

Be that as it may, having perused the appeal record, I am of the view this is a proper case where I should exercise the Court's power of revision in order to ensure that justice is not only done but seen to be done. To my mind the charge as it stands is insufficient to enable the applicants to properly prepare their defence. In complicated case of forgery or cheating under the Penal Code, or sedition under the Sedition Act 1948 (revised 1969), it is of utmost importance that the charge should state with clarity in what manner the forgery, cheating or sedition had been committed. The practical way of doing this is to annex the particularisation of the offence to the charge. An accused person must be given such particulars as are reasonably sufficient to give him notice of the matter with which he is charged so that he can properly prepare his defence. This requirement can clearly be inferred from ss. 152, 153 and 154 of the Criminal Procedure Code. It is provided under s. 173(a) CPC that when the accused appears or is brought before the Court, a charge containing the particulars of the offence of which he is charged shall be framed. Section 153(i) CPC goes on to say the charge shall contain such particulars as to the time and place of the offence and the person against whom or the thing in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged, and s. 154 goes further to provide that when the nature of the case is such that the particulars mentioned in ss. 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. In my view, in cases of forgery where various documents had been specifically referred to in the charge in respect of which the forgery was committed or by which the crime was perpetrated, the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instruction to his Counsel before trial. It is true that in the present case the five documents referred to in the charge would be produced by the prosection at the trial in order to prove their case, and as and when they are tendered in evidence, the accused can always apply for reasonable adjournments to enable their Counsel to study them. But for practical purposes such adjournments could and should be avoided by furnishing them to the accused before trial. In this context, the defence is not afforded with discovery of documents but merely with further and better particulars of the charge on condition that by so doing the prosecution would in no way be prejudiced. The important thing is to keep a proper balance between the right of the accused to know exactly what the charge is against him so as to give him reasonable opportunity to prepare his defence, and the right of the prosection not to disclose their evidence and the manner in which they are to prove their case before trial in order to sustain our adversary system of criminal justice. To what extent the right of the prosection not to disclose documents specifically referred to in the charge before trial is qualified by the right of the accused to be given reasonable opportunity to prepare his defence is of crucial importance in the administration of criminal justice. To my mind, the answer must depend on the facts of each particular case. In forgery cases, what particulars are reasonably sufficient to give the accused notice of the matter with which he is charged must necessarily depend on the complexity and circumstances of each case. By their very nature the five documents specifically referred to in the present charge are not simple documents. In order that justice is not only done but seen to be done, the respondents are entitled to know, for example, which particular Bill of

Lading, which Certificate of Origin and which certificate referring to motor tanker "GRACITA", they are alleged to have forged. For practical purposes, I would go so far as to say that in the circumstances of the present case, copies of the five documents ought to be annexed to the charge. Since the five documents have already been referred to in the charge, it is difficult to conceive how the prosecution can be prejudiced by supplying photostat copies of these documents to the respondents. On balance this is a case where the right of the accused to be given reasonable opportunity to prepare his defence overrides the right of the prosecution to withhold documentary evidence before trial.

In the circumstances, although respondent's applications were not properly made under s. 51(i) of the Criminal Procedure Code and the order of the learned President must be set aside, I would exercise my power of revision and allow the first part of the order to remain on the ground that the respondents were entitled to further and better particulars of the charge to enable them to prepare their defence and give instructions to their Counsel. Although I allow this appeal and set aside the order of the learned President, I order that photostat copies of the documents specifically referred to in the charge be supplied by the Public Prosecutor to the respondents.

Also found at [1983] 1 CLJ 321